

1 The Honorable Thomas S. Zilly
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1 I. INTRODUCTION

2 HyTech Power, Inc. (now HTP, Inc.) and Henry Dean, in his capacity as Trustee for the
 3 Sharon Graham Bingham 2007 Trust, respectfully request the Court reconsider the January 31,
 4 2019 Order Granting Plaintiff's Motion for *Ex Parte* Order to Compel Compliance and for
 5 Sanctions, Dkt. No. 251 (the "Order"). The Order was entered without allowing HyTech
 6 Power, Inc. or the Trustee a reasonable opportunity to respond. Reconsideration of the Order is
 7 appropriate because Judge Tsuchida adopted statements made in the supporting declaration of
 8 LVB's counsel where the statements were at minimum misleading. Due process requires
 9 granting the Trustee and HyTech Power, Inc. a reasonable opportunity to respond to a request
 10 for sanctions, particularly when the Court is now contemplating a further sanction of the
 11 inability to challenge transfers as fraudulent transfers, i.e., taking away HyTech's defense
 12 notwithstanding documentation regarding those transfers have been produced.

13 II. AUTHORITY & ARGUMENT

14 28 U.S.C. § 636 provides in relevant part:

15 (b)(1) Notwithstanding any provision of law to the contrary--

16 (A) a judge may designate a magistrate judge to hear and determine any pretrial
 17 matter pending before the court, except a motion for injunctive relief, for
 18 judgment on the pleadings, for summary judgment, to dismiss or quash an
 19 indictment or information made by the defendant, to suppress evidence in a
 20 criminal case, to dismiss or to permit maintenance of a class action, to dismiss
 21 for failure to state a claim upon which relief can be granted, and to involuntarily
 22 dismiss an action. A judge of the court may reconsider any pretrial matter under
 23 this subparagraph (A) where it has been shown that the magistrate judge's order
 24 is clearly erroneous or contrary to law.

25 Fed. R. Civ. P. 72 provides, in relevant part:

22 (a) Nondispositive Matters. When a pretrial matter not dispositive of a party's
 23 claim or defense is referred to a magistrate judge to hear and decide, the
 24 magistrate judge must promptly conduct the required proceedings and, when
 25 appropriate, issue a written order stating the decision. **A party may serve and
 26 file objections to the order within 14 days after being served with a copy.** A
 27 party may not assign as error a defect in the order not timely objected to. The

OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
 DKT. NO. 251 - 1
 (2:18-cv-00243-TSZ)

BORDE LAW PLLC
 600 Stewart Street, Suite 400
 Seattle, Washington 98101
 (206) 905-6129

1 district judge in the case must consider timely objections and modify or set
2 aside any part of the order that is clearly erroneous or is contrary to law.
3

4 Local Civil Rule 72 provides in relevant part:
5

6 Except as otherwise provided by court order or rule, objections to a magistrate
7 judge's order or recommended disposition, or any response thereto, shall not
8 exceed twelve pages.
9

10 (a) Nondispositive Matters
11

12 Any objection filed pursuant to this subsection must be noted for consideration
13 for the day it is filed. No response shall be filed unless requested by the court.
14 The request will set a date when the response is due, and may limit briefing to
15 particular issues or points raised by the objections, may authorize a reply, and
16 may prescribe page limitations.
17

18 A. It was clearly erroneous and contrary to law to issue sanctions without affording the
19 defendants a reasonable opportunity to respond to the request for sanctions.
20

21 Local Civil Rule 7(d)(1) contemplates the filing of *ex parte* motions. The rule does not,
22 however, spell out what may be necessarily considered on an *ex parte* basis. The customary
23 practice in this District is for *ex parte* motions to be filed for truly emergent matters or
24 unopposed motions. Plaintiff sought discovery sanctions in its *ex parte* motion. Local Civil
25 Rule 37 addresses discovery motions, and requires a meet and confer prior to the filing of any
discovery motions. Despite the request of HTP's counsel that it do so, LVB made no such
attempt to meet and confer notwithstanding the motion LVB unilaterally filed sought sanctions
(and not to mention on the bases that: (a) the defendants did not re-produce emails LVB
already has in its possession and (b) email accounts over which HyTech Power, Inc. has no
control and where no responsive records would reasonably be expected to be found were not
searched). LVB's motion can and should be denied as a result of LVB's willful refusal to meet
and confer.
26

27 But even if LVB was not required to meet and confer with HyTech Power, Inc. or the
28 Trustee prior to seeking sanctions for purported discovery violations, the Court should
29

30 OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
31 DKT. NO. 251 - 2
(2:18-cv-00243-TSZ)

32 BORDE LAW PLLC
33 600 Stewart Street, Suite 400
34 Seattle, Washington 98101
(206) 905-6129

1 reconsider Judge Tsuchida's Order sanctioning the Trustee and HyTech Power, Inc. without
 2 giving the parties any reasonable opportunity to respond. LVB filed its *ex parte* motion on
 3 January 29, 2019 at 5:58 PM. The Order was entered on January 31, 2019 at 9:29 AM, the day
 4 after it was referred to Judge Tsuchida by this Court. Not only was there no justification to file
 5 the motion *ex parte*, it was contrary to law to preclude the Trustee and HyTech Power, Inc. a
 6 reasonable opportunity to respond to LVB's assertions. *See, e.g., Mission Power Eng'g Co. v.*
 7 *Cont'l Cas. Co.*, 883 F. Supp. 488, 490 (C.D. Cal. 1995) (finding that "ex Parte motions are
 8 rarely justified"); *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) (due process requires that
 9 affected parties "are entitled to be heard" following "meaningful" notice, except in
 10 "extraordinary situations"); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 339-40
 11 (1969) ("the right to be heard has little reality or worth unless one is informed that the matter is
 12 pending and can choose for himself whether to appear or default, acquiesce or contest").

13 There was no justification for the motion to be filed *ex parte* and for the motion to be
 14 granted without a reasonable opportunity for HyTech Power, Inc. and the Trustee to be heard
 15 when it was supported by a sworn misleading statement by LVB's counsel. To wit, LVB
 16 argued "Defendants' willingness to ignore multiple discovery orders of this Court is appalling,
 17 beyond anything LVB ever would have expected . . .," Dkt. No. 248 at 3:5-6. More appalling
 18 is plaintiff's counsel's misrepresentation to the court regarding the claimed failure to search
 19 and produce Mr. Dean's emails at HyTech Power, Inc. LVB provided that an incomplete
 20 production was made because "HyTech unilaterally limited LVB's requests to the year 2018
 21 only . . ." Dkt. No. 248 at 2:1-2 (emphasis in original). LVB omitted that all that was
 22 required to be produced was emails from January 2018 onward because January of last year is
 23 when Mr. Dean's email accounts at HyTech Power, Inc. were last swept for LVB. *See*
 24 Declaration of Norman Yee (filed herewith as Attachment A and originally filed in Case No.
 25

OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
 DKT. NO. 251 - 3
 (2:18-cv-00243-TSZ)

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 600 Stewart Street, Suite 400
 Seattle, Washington 98101
 (206) 905-6129

1 2:17-cv-00528-TSZ at Dkt. No. 56) at ¶¶ 4, 6, 7. Every single one of these emails (indeed,
 2 466,000 emails in all) were delivered to LVB.¹ Moreover, Mr. Jennings has certified on behalf
 3 of HyTech that he searched his email where it might be expected that responsive documents
 4 would be located back to June of 2016 which is far back as the beginning of the existence of
 5 HyTech's server. *See* Dkt. No. 260.

6 LVB next argued sanctions were appropriate because HyTech Power, Inc. did not run
 7 searches in accounts held by former employees Doug Durst, Phil Jennings and Thomas
 8 Mentele. But there were only eight transactions in total between the Trust and HyTech Power
 9 Inc. (now HTP) and according to Jason Jennings, there was no reason to believe that any of
 10 these three individuals would have any records of communications regarding these transactions
 11 or anything to do with them. LVB's demand to run searches on these accounts was made on
 12 Thursday, January 24, 2019, well after the discovery cut-off date. *See* Dkt. No. 248-10 (Faria
 13 declaration at page 4 of 7). Mr. Jenning's declaration reflects that he had nevertheless been
 14 making arrangements with HyTech Power LLC, which now controls the pertinent email server,
 15 to obtain those emails. Dkt. No. 260 at 3-4. His good faith effort to try to obtain these emails
 16 to be searched is what has delayed his filing of the required second certification. Dkt. No. 260
 17 at 3-4. His second certification has now been filed. *See* Dkt. No. 260.

18 The basis proffered by LVB for running searches in these custodians' email accounts
 19 and producing for LVB are a handful of emails identified by Mr. Faria from 2017 concerning
 20 what appears to be a dispute with an employee, cash flow related issues (potential investments
 21 from private investors versus the company's payables), and a confidential discussion with a
 22 prospective investor. Nothing Mr. Faria produced had anything to do with the transactions in
 23 issue or the Sharon Graham Bingham Trust. Mr. Faria has had an entire year to pour over all

24
 25 ¹ Apparently, notwithstanding the 466,000 emails produced by Henry Dean and Cicilia Park to date, LVB still
 does not have adequate evidence to prepare its case for trial.

1 of the HyTech emails of Henry Dean. Mr. Faria's inability to support his declaration with any
 2 meaningful emails proves Mr. Jennings original conclusion and confirms his belief that there
 3 was no sound basis to require a search of these three additional email accounts.

4 Importantly, HyTech Power, Inc. (now HTP) is not a judgment debtor. It is not
 5 controlled by any of the judgment debtors or by Mr. Dean. The claims against HyTech Power,
 6 Inc. are for eight alleged fraudulent transfers from the Sharon Graham Bingham 2007 Trust.
 7 All but three of these were primarily loans, all of which were repaid. Nothing in these
 8 communications filed by LVB justify satisfying the belated request of LVB to search three (3)
 9 additional custodians when there is no likelihood of locating responsive records. Mr. Faria
 10 assumes the company is exposed to endless discovery by the court's recent orders at Mr.
 11 Faria's whim, but even if the loans repaid by HyTech Power, Inc. could somehow equate to a
 12 fraudulent transfer voidable by LVB (which in the first instance requires concluding that
 13 Sharon Bingham controls Henry Dean, evidence to which has not yet been revealed by LVB
 14 notwithstanding the 466,000 emails in LVB's possession), the reality is that all the responsive
 15 documents in HyTech Power, Inc. (now HTP)'s control have been produced.

16 Even if the Court was inclined to entertain plaintiff's recent discovery demand
 17 regarding the email accounts of Durst, Jennings and Mentele, the request should have been
 18 denied under the proportionality test that must be satisfied under Fed. R. Civ. P. 26. Rule 26(b)
 19 provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is
 20 relevant to any party's claim or defense and proportional to the needs of the case, considering
 21 the importance of the issues at stake in the action, the amount in controversy, the parties'
 22 relative access to relevant information, the parties' resources, the importance of the discovery
 23 in resolving the issues, and whether the burden or expense of the proposed discovery
 24 outweighs its likely benefit." Any request that requires HTP Inc. on short notice to prevail
 25

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1 upon on a non-party, HyTech Power, LLC, to search and produce emails for Doug Durst, Phil
 2 Jennings, and Thomas Mentele, is not proportional to the needs of LVB's claim against
 3 HyTech Power, Inc. Regardless, the email accounts of Durst, Jennings and Mentele have now
 4 been searched. Dkt. No. 260 at 5.

5 As pointed out in HyTech Power, Inc.'s motion for protective order, Dkt. No. 175 at
 6 6:9-7:2, the aggregate amount of the transfers/loans sought to be avoided by LVB equates to
 7 \$311,166.90. Of this amount, \$210,000 corresponds to loans from the Sharon Graham
 8 Bingham 2007 Trust that have been repaid by HyTech. Of the \$101,166.90 that does not
 9 concern loans that were repaid, \$50,000 was received for the purpose of facilitating share
 10 purchases of the principals of the contractor that was doing remodel work on Park Place
 11 Motors, who had elected to receive their compensation for the remodel work in this manner.
 12 Of the \$101,166.90 that does not concern loans that were repaid, \$50,750 concerns amounts
 13 earned by Mr. Dean as trustee compensation received by HyTech for the purpose of purchasing
 14 shares for individuals with whom Mr. Dean has relationships. Neither these facts nor the
 15 emails highlighted in the Faria declaration (concerning a dispute with an employee, cash flow
 16 related issues, and a confidential discussion with a prospective investor) justified imposing a
 17 burden on HTP Inc. to persuade HyTech Power, LLC, to search the emails of additional email
 18 custodian accounts that are inactive for documents that are extremely unlikely to be found
 19 there. Accordingly, LVB's motion should have been denied, and at a minimum, sanctions
 20 were not warranted.

21 B. It was clearly erroneous and contrary to law for the Court to conclude that the privilege
log was not adequate given governing 9th Circuit law.

22 Judge Tsuchida adopted LVB's summarily presented contention that the Trustee's
 23 privilege log was inadequate because it contained no explanation for the basis of the privilege,
 24 apparently as a result of the inclusion of a handful of emails that were forwards of jokes. The
 25

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1 Trustee was not required to provide an “explanation” for the attorney client communications.
 2 The requirements for a privilege log are set forth in *In re Grand Jury Investigation*, 974 F.2d
 3 1068, 1071 (9th Cir. 1992).

4 In *Dole*, the log identified (a) the attorney and client involved, (b) the nature of
 5 the document, (c) all persons or entities shown on the document to have
 6 received or sent the document, (d) all persons or entities known to have been
 7 furnished the document or informed of its substance, and (e) the date the
 8 document was generated, prepared, or dated. *Id.* at 888 n. 3. The log submitted
 9 by the Corporation in this case fulfilled conditions (a), (b), (c), and (e).
 10 Furthermore, the Corporation’s privilege log went beyond the *Dole* standards to
 11 provide information on the subject matter of each document. Whatever
 12 questions the Corporation’s log might leave open with regard to whom the
 13 documents were shown or were intended to be shown are answered to our
 14 satisfaction by the affidavits of the attorneys responsible for preparing the
 15 documents. Therefore, the Corporation has met its burden in demonstrating the
 16 applicability of the attorney-client privilege.

17 In *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Here the
 18 Trustee’s privilege log identified: (a) the attorney and client involved; (b) the nature of the
 19 document (as they are all emails); (c) all persons or entities shown on the emails to have
 20 received or sent the emails; (d) all persons or entities known to have been furnished the
 21 document; and (e) the date the document/email was generated. The Trustee even included
 22 information about the subject matter of the emails, even though that is not required under *Dole*.
 23 The magistrate judge’s order as to the inadequacy of the privilege log is contrary to governing
 24 Ninth Circuit law. It is unfortunate that Plaintiff’s counsel determined that the handful of
 25 emails that were joke forwards justified a motion, but that is one example why the Plaintiff’s
 litigation strategy has resulted in a barrier to settlement (i.e. in inability for a positive recovery
 given Plaintiff’s attorneys’ fees).

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1 C. The Court's Order on the *ex parte* motion should be revised to absolve the Trustee and
 2 HyTech Power, Inc. of sanctions.

3 The Court has witnessed on two separate occasions (the most recent hearing and the
 4 earlier hearing on the preliminary injunction motion) the propensity of Plaintiff's counsel to
 5 over-reach when addressing the Court. Mr. Faria continued this mode of conduct by
 6 misleading the magistrate in to thinking that HyTech Power, Inc./the Trustee had unilaterally
 7 selected emails from January 2018 going forward for production. Therein lies the problem
 8 when a party is not permitted a reasonable amount of time to be heard. Mr. Faria elected not to
 9 provide that emails from Mr. Dean's HyTech email account had been collected in January of
 10 2018. Further, the Trustee's privilege log is adequate under the standards imposed by *Dole* and
 11 *In re Grand Jury Investigation.*

12 The imposition of sanctions on HyTech Power, Inc. and the Trustee are not warranted
 13 under these circumstances. The Trustee and HyTech Power, Inc. respectfully request the Court
 14 modify the Order at Dkt. No. 251 such as to: (1) strike the monetary sanctions as to HyTech
 15 Power, Inc. and the Trustee; (2) strike the new deadline for LVB to oppose any summary
 16 judgment motions; (3) strike the requirement that HyTech Power produce all responsive email
 17 from Henry Dean's account for 2010 to the present (since LVB has everything except for
 18 emails from January 2018 onward); (4) strike the requirement that the Trustee "produce a
 19 complete privilege log for all documents being withheld, including a column explaining the
 20 subject matter of the communication and basis for withholding the document as privileged; and
 21 (5) strike the provision that "should Defendants fail to comply in full with this Order, the Court
 22 will recommend terminating sanctions" (at least as to the Trustee and HyTech Power, Inc.).

23 Mr. Jennings faced unanticipated difficulties in accessing the emails for just the last
 24 half of 2018 as a result of the sale of HyTech Power, Inc.'s assets. This is not the case where
 25 no documents/emails have been produced. Literally hundreds of thousands of emails have

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been produced in this case. LVB has failed to attempt to articulate what potentially may be in these emails that is not and would not be in the massive amount of data it already has in its possession.

III. CONCLUSION

It is an inherent lack of due process to impose the range of sanctions imposed by Judge Tsuchida on an *ex parte* basis and where the supporting statement from counsel was, at a minimum, misleading. Such an outcome is contrary to law and clearly erroneous. Further, the privilege log provided by the Trustee met the requirements under governing Ninth Circuit law. Accordingly, the Order and sanctions imposed are also contrary to law and should be modified.

Dated this 5th day of February, 2019.

s/ Scott B. Henrie
Scott B. Henrie, WSBA # 12673
WILLIAMS, KASTNER & GIBBS, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6600
shenrie@williamskastner.com

*Attorneys for Defendants Henry Dean, as
Trustee of the Sharon Graham Bingham 2007
Trust, HyTech Power, Inc., and Park Place
Motors, Ltd.*

OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
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600 Stewart Street, Suite 400
Seattle, Washington 98101
(206) 905-6129

1 CERTIFICATE OF SERVICE

2 I hereby certify that on February 5, 2019, I electronically filed the foregoing with the
3 Clerk of the court using the CM/ECF system which will send notification to the attorneys of
4 record in this case, including the following:

5 Scott B Henrie shenrie@williamskastner.com, rvansteen@williamskastner.com

6 Dennis John McGlothin dennis@westwalaw.com, docs@westwalaw.com

7 Emanuel Fraser Jacobowitz manny@jjalaw.com, Pattie@jjalaw.com

8 Jeffrey L Willian jwillian@kirkland.com

9 Jonathan J Faria jonathan.faria@kirkland.com, amy.palafox@kirkland.com,
michael.tecuanhuehue@kirkland.com, tammy.tsoumas@kirkland.com

10 Nathan J Arnold nathan@jjalaw.com, pattie@jjalaw.com

11 R. Bruce Johnston bruce@rbrucejohnston.com

12 Robert Joseph Cadranell , II Robert@westwalaw.com, docs@westwalaw.com

13 Tammy Ann Tsoumas tammy.tsoumas@kirkland.com

14 William Randolph Squires , III rsquires@correronin.com, amy.palafox@kirkland.com,
mbdahl@correronin.com, reception@correronin.com

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OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
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BORDE LAW PLLC
600 Stewart Street, Suite 400
Seattle, Washington 98101
(206) 905-6129

1 DATED this 5th day of February, 2019.

2 s/ Scott B. Henrie

3 Scott B. Henrie, WSBA # 12673
4 WILLIAMS, KASTNER & GIBBS, PLLC
5 601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6600
shenrie@williamskastner.com

6 *Attorneys for Defendants Henry Dean, as*
7 *Trustee of the Sharon Graham Bingham 2007*
Trust, HyTech Power, Inc., and Park Place
Motors, Ltd.

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OBJECTION TO ORDER ENTERED BY MAGISTRATE JUDGE,
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600 Stewart Street, Suite 400
Seattle, Washington 98101
(206) 905-6129